

A MICHAEL CHOW KEAT THYE

v.

SURUHANJAYA SEKURITI MALAYSIA & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR  
ABANG ISKANDAR J  
[JUDICIAL REVIEW NO: R1-25-288-11-2011]  
2 APRIL 2012

C **CIVIL PROCEDURE:** *Judge - Application to recuse judge - Real danger of bias if judge heard case - Whether existed - Judge was once employed by one of respondents - Whether affected his impartiality to hear case - Whether judge left respondent's employ long before subject-matter of suit happened - Whether judge had duty to disclose fact of his previous employment with respondent to parties in suit*

D The first respondent ('the SC') applied to have the judge hearing the instant judicial review application recused on the ground that there was a real danger of bias if he continued to hear the case. The SC submitted that the judge failed to disclose to the parties that he was in its employ prior to his appointment to the Bench. As a result, it was  
E argued that the leave he had granted *ex parte* to the applicant to apply for judicial review of a decision of the SC ('the decision') in the instant case should be set aside.

**Held (dismissing application):**

- F (1) No evidence was adduced that the judge was in any way privy to the investigation of the transaction concerning the applicant which was under review by the SC and which resulted in the decision. The judge had left the employment of the SC long before the  
G transaction in question happened. The judge, therefore, could not have been acquainted with the circumstances surrounding the decision. (para 3)
- (2) The mere fact that the judge was in the employment of the SC did not *ipso facto* and without more, cast a duty on him to declare that  
H fact. The fact that he was once employed by the SC was in the public domain. The continuing duty on the judge to disclose would only arise if there was some fact which, unknown to the parties, that the judge had somehow become acquainted with the investigations in this case which would have compromised his impartiality as a judge in hearing the matter. If no such scenario  
I existed, no such duty to disclose arose. (para 3)

(3) Past associations including a mere past history of employment was insufficient to premise an objection founded on a real danger of bias on the part of the judge. In addition to that past association, there had to be a clear nexus between the judge and the circumstances surrounding the making of the decision before a duty to disclose arose for the judge to appraise the parties before him of his role in the impugned decision. Nothing in the whole scheme of things in this case obligated the judge to disclose to the parties the fact that he was once in the SC's employment. (para 3)

(4) As the SC had failed to show any conflict existed by the incidence of the judge's former employment with the SC and as no nexus between the judge and the SC was shown such that there in fact existed an apparent bias that was sufficient to compromise the judge's impartiality in hearing the instant matter, the judge was duty-bound to hear the instant case. (paras 3 & 7)

**Case(s) referred to:**

*Bumicrystal Technology v. Rowstead Systems Sdn Bhd* [2004] 6 CLJ 85 HC (**refd**)

*Locabail and Another; Timmins v. Gormley and Others* [2000] QB 451 (**refd**)

*Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police* [2001] 3 CLJ 198 HC (**refd**)

*Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 FC (**refd**)

*R v. Bow Street Metropolitan Stipendiary Magistrate and other, ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577 (**dist**)

*R v. Gough* [1993] AC 646 (**refd**)

*For the applicant in JR application - S Sivaneindiren (Peter Skelchy with him); M/s Cheah Teh & Su*

*For the 1st respondent in JR application but as applicant in recusal application - Cecil Abraham (Nanthabalan, Sunil Abraham with him); M/s Zul Rafique & Partners*

*For the intervener in JR application - Wai Lai Fong; M/s Shearn Delamore & Co*

*For the minority shareholders' watchdog - M Rajasekaran & Carol Tiong*

*Reported by Ashok Kumar*

## JUDGMENT

**Abang Iskandar J:**

[1] The issue is the judge should have disclosed to the parties that he was, at one point of time in his career in the employment of the first respondent, before proceeding to hear the application for leave for judicial review to review the impugned decision. For the dispelling of any doubt, the term 'the judge' as used in this judgment is a reference to me as the judge sitting in this case, whom the first respondent, *via* this application in encl. 14 is seeking to be recused from hearing this

A case. It was the contention for the first respondent that as the judge had failed to declare that fact, the leave that was granted *ex parte* to the applicant on 8 November 2011 must be set aside.

B [2] Having heard and considered the submissions by both parties, the question that came to be decided has become whether the continuing duty to disclose by the judge actually arose in this case under the circumstances that was obtained before this court.

[3] To my mind, the answer ought to be in the negative for two reasons:

C (a) The judge had left the employment of the first respondent some five years ago, in 2007. From the evidence as led in the affidavits filed in this case, the transaction that had culminated in the investigation that had resulted in the decision by the first respondent that is now being impugned by way of an application for judicial review in  
D encl. 1 in this court, happened sometime in the middle of last year, that was in 2011. How could the judge have been ever acquainted with the circumstances surrounding the decision of the first respondent pertaining to that case. Indeed, there was no evidence adduced by either party that the judge was in any way privy to the  
E investigation of the transaction under review by the first respondent. The relationship that the judge had with the senior management of the first respondent was, as cited in the first respondent's affidavit, professional in nature and that was some five years ago.

F Learned counsel for both the parties had cited the case of *Locabail and Another; Timmins v. Gormley and Others* [2000] QB 451. The *Locabail's* case (*supra*) is highly instructive, where the English Court of Appeal Bench consisting of Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC had, among others, this to  
G say:

H It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means of sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or  
I **employment background or history** nor that of any member of the judge's family, or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures,

speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitors or advocates engaged in a case before him; or membership of the same Inn, circuit. Local law society or chambers (*KFTCIC v. Jcori Estero Sp A* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report Vol 6 #8 8/91). (emphasis added)

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To my mind from that *Locabail's* case (*supra*), it is clear that past associations including a mere past history of employment is never sufficient as valid ground to premise an objection founded on a real danger of bias on the part of the judge. In addition to that past association, there must be a clear nexus between the judge and the circumstances surrounding the making of the impugned decision before a duty to disclose arises for him to appraise the parties before him of his role in the impugned decision. In this case presently before this court, it was not only remote, there was no inkling, neither was there an iota of evidence, to even form any basis upon which any form of relationship could possibly be conjured between the judge and the first respondent of a nature which would render it capable of being construed as one that had posed a real danger of bias on the part of the judge such that his capacity to hear this case wholly untenable and such that he must recuse himself accordingly. The fact of the matter is that, in my considered view, there is nothing in the whole scheme of things pertaining to this case, which would have obligated the judge to disclose to the parties of the fact that he was at one point of time in his career in the employment of the first respondent.

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The learned counsel for the first respondent had also cited the case of *R v. Bow Street Metropolitan Stipendiary Magistrate and other, ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577. The circumstances in the *Pinochet's* case (*supra*) are indeed different from those that arise in this case. In *Pinochet's* case (*supra*), the learned judge Lord Hoffman, at the time of the hearing was a director and a chairperson of the Amnesty International Charity Ltd which had a close link with the Amnesty International. As the facts of that case would reveal, Amnesty International, was a party to the proceedings that was concerned with the pursued extradition of General Pinochet from the United Kingdom to Argentina. It was the express intention of Amnesty International Charity Ltd, of which the judge was a chairperson, to bring General Pinochet to justice for his alleged rampant breaches and abuses of human rights in his home country Argentina. So his seemingly 'partisan' (for want of a better word) stand on the issue was clearly in conflict with his duty as a sitting judge in judgment of *General Pinochet's* case. The fact that his wife

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- A also associated with Amnesty International in not an unsubstantial way only made his position as the judge hearing that case, who must be seen to be impartial, more untenable. So, clearly, the factual matrix obtaining in the *Pinochet*'s case can be readily distinguished from the one obtaining in this case. In my considered view, nothing
- B of that sort existed between the judge in this case and either applicant or the first respondent. There is no conflict that was shown to have been created by the incidence of his former employment with the first respondent five years ago. There is nothing that the judge had to disclose to either party. To my mind,
- C the mere fact that the judge was in the employment of the first respondent does not *ipso facto* and without more, cast a duty on the judge to declare such a relationship. As was alluded to by the applicant in his affidavit, a factual circumstance that was not rebutted, the fact that the judge was once in the employment of the
- D first respondent was in the public domain. The continuing duty on the judge to disclose would, to my mind arise, if there is some fact which unbeknown to both parties, somehow the judge had become acquainted with the investigations of this case and which would compromise his impartiality as a judge hearing the same matter, then and only then, would the need to disclose become an attendant duty
- E on the judge in line with his obligation to so discharge, as a continuing duty. That duty would arise in such a case because there is the risk of a real danger of biasness creeping in to colour the judge's mind, unbeknown to the parties seeking impartial justice before him. If no such scenario exists, then with respect, no such
- F duty to disclose is triggered and as such the duty to disclose does not arise at all. In my considered view, the first respondent had failed to establish the nexus between the judge and the first respondent such that there in fact had existed an apparent bias that was sufficient to compromise the impartiality of the judge as a sitting judge adjudicating the judicial review application before him.
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- (b) That, as was evident in the affidavit of the applicant in this case, he was aware of the fact that the judge was employed in the service of the first respondent, before the judge became a Judicial Commissioner, and later as a judge, of the High Court in Malaya.
- H Despite that circumstance, he did not raise any concern when the *ex parte* application or leave was being heard before this court. It would have been more probable as between the parties, to expect the applicant to apply for the judge to recuse himself if any such application of this nature, were to be raised. As regards disclosing
- I to the first respondent, it would be a rather futile exercise because that very fact of the judge's employment was very well within its knowledge. The fact that the first respondent had applied for the

judge to recuse himself even before the *inter partes* hearing was heard is clear testament of the fact that it was appraised of the judge's former employment in its service. A 'disclosure', therefore, as the word suggests connotes an act of revealing a fact that was not already in the knowledge of the party to which the fact is to be disclosed. The *Concise Oxford Dictionary*, 9th edn. has defined the root word 'disclose' to mean '1. to make known; to reveal 2. To remove from cover; to expose to view.' The word 'reveal' has been defined to mean among others, to 'divulge' and to divulge has been defined to mean to 'reveal as with a secret.' In the context of this case, such a disclosure by the judge would be an impossibility, to say the least. This because, his employment with the first respondent was a known fact to all and sundry being in the public domain including to both parties and that there was no fact deserving of mention to both parties existed involving the judge with the case under review, which otherwise would have obligated the judge to disclose, as part of his continuing duty of disclosure.

[4] The other cases cited by learned counsel for the first respondent had been distinguished quite ably by learned counsel for the applicant and my considered view is that those cases do not forward the first respondent's case any much further in the circumstances of this case. The test applicable is the real danger of bias test as was accepted by our Federal Court case of *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; [2002] 1 MLJ 321 which adopted the English position as enunciated in the case of *R v. Gough* [1993] AC 646. In the context of this case the circumstances did not create that situation where the duty to disclose even arose. Indeed, the cases in annexure C and annexure D in encl. 29 being the written submission of the applicant clearly illustrated instances where recusal applications were successful and where they had failed both before our local courts as well as in other jurisdictions, in particular in England. As an example, the *Gough's* case (*supra*) itself the application to set aside a conviction on the ground that one of the jurors was the next door neighbour of the accused was not good or sound enough a ground for the House of Lords to agree with the applicant that the said conviction against him was tainted with biasness on account of that fact of the juror in question was his next door neighbour. On the other hand, the *Locabail; Timmins v. Gomley's* case (*supra*) the application was successful because the recorder had previously expressed views critical of the defendants and their insurers through published articles. In the case where it was successful, the nexus between the recorder and the defendants was clearly disturbing in the sense that previous critical views expressed by the recorder against the defendants and their insurers would surely impact adversely on the impartiality issue that had become key and rightly so, if I may say so,

A in the context of that case. But in this application before this court, nothing close resembling that scenario even existed so as to form any basis to arouse any suspicion that the judge may be partial in hearing this judicial review application that seeks to challenge the first respondent's decision. The grounds cited by the first respondent to  
B recuse the judge from hearing this case and the evidence led in support thereof do not qualify as a valid excuse to justify the judge to recuse himself from hearing this application for judicial review by the applicant. As the learned Law Lords in the *Locabail's* case (*supra*) had said:

C It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided.

[5] To my mind, the factual matrix before this court does not establish the necessary situation which would have compromised the  
D judge's impartiality. In a situation where no such circumstance exists, in the words of Justice Augustine Paul J (as he then was) in the case of *Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police* [2001] 3 CLJ 198; [2001] 2 MLJ 481 for a judge to recuse from hearing a case would tantamount to a dereliction of duty on his part. At p. 211 (CLJ);  
E p. 501 (MLJ) of that case, His Lordship had this to say:

Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact, it would be a gross  
F dereliction of duty for a judge to disqualify himself when there are no grounds.

[6] To my mind, the decision in the case of *Bumicrystal Technology v. Rowstead Systems Sdn Bhd* [2004] 6 CLJ 85; [2004] 6 MLJ 169 was clear in that regard as well.  
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[7] So in the final analysis, in the context of a potential conflict, it is not the question of whether or not a judge wants or insists, or that he does not want, to hear a case, because the practical test is rather simple, 'if there is no real danger of bias on the part of the judge, then he  
H ought nay, he is indeed duty bound, to hear the case, and there are no two ways about it'. I think that, in all humility, is the simple rule of the thumb for a judge to observe and apply.

[8] Based on that, this application to have the judge recused from hearing this case is dismissed with costs of RM3,000. Order accordingly.  
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